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BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 35504

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

JOINT REPLY COMMENTS OF THE AMERICAN CHEMISTRY COUNCIL; THE CHLORINE INSTITUTE; THE FERTILIZER INSTITUTE; AND THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

PRELIMINARY STATEMENT

The American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and The National Industrial Transportation League (collectively the "Interested Parties") hereby submit these Joint Reply Comments in accordance with the December 12, 2011, decision of the Surface Transportation Board ("STB" or "Board") in the above-captioned proceeding. In these Reply Comments, the Interested Parties show that (1) the concerns expressed by Union Pacific Railroad Company ("UP") over liability from a catastrophic release of TIH materials is really a pretext to avoid liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 U.S.C. §§ 9601 *et seq.*), for a broad range of non-TIH commodities; (2) the UP and other railroad parties are attempting to unduly broaden the scope of this proceeding; and (3) contrary to railroad claims, the UP tariff indemnification requirements do not provide any safety incentives to shippers that do not already exist.

ARGUMENT

I. THIS PROCEEDING IS ABOUT AVOIDING CONGRESSIONALLY-DETERMINED LIABILITY UNDER CERCLA.

If one reads the cover page of UP Tariff 6607 and the selected tariff items that UP has chosen to introduce into the record, one would conclude that this proceeding deals with "General Rules for Movement of Toxic or Poison Inhalation Commodity Shipments over the Lines of the Union Pacific Railroad Company." If one reads the statements and arguments of the various railroads and the railroad trade association supporting the UP position in this matter, one would also conclude that Tariff 6607 is designed to protect UP from the liabilities faced by it in the highly improbable scenario of a catastrophic release of a TIH material when UP was not negligent but nevertheless was confronted with liabilities so great as to potentially "bankrupt" the company. In fact, neither of these conclusions is correct.

Although Item 2 of Tariff 6607 provides that the terms of the Tariff apply to toxic inhalation hazards as defined by the U.S. Department of Transportation ("DOT"), it does not stop there. Item 2 states that the Tariff also applies to environmentally sensitive commodities listed as hazardous substances in 49 C.F.R. 173.31(f)(2) that are not inhalation hazards[1], and infectious substances as defined by DOT as Division 6.2 materials. Because UP chose to omit Item 2 from the Tariff excerpts that it provided to the Board with both its Petition for Declaratory Order and Opening Comments, and because UP discussed only TIH materials in those same pleadings, the broad application of Tariff 6607 beyond TIH materials would go unnoticed, unless the Board chose to

[1] This list of some 75 commodities contains many commodities that when released to the environment can and do result in substantial clean-up costs but seldom cause any immediate threat to human health.

download the Tariff for itself from UP's web site. The same is true for the insurance requirements in Item 85 of the Tariff.

While environmentally sensitive commodities are not TIH materials, they are hazardous substances that, when released into the environment, can and do result in substantial clean-up costs under the terms of CERCLA. Section 101 (20)(B) of CERCLA (42 U.S.C. § 9601 (20)(B)) provides that a common carrier railroad that accepts hazardous substances for transportation, including the environmentally sensitive commodities referred to in Item 2 of UP Tariff 6607, is the owner or operator for purposes of CERCLA clean-up liability. Because CERCLA imposes strict liability for clean-up, the railroad is liable for clean-up costs for the release of hazardous substances that occur when the substance is in the control of the railroad. Further, the same section provides that the shipper is not liable for the clean-up costs unless the release is caused by some act or omission of the shipper.

When one reads the provisions of Item 2 of UP Tariff 6607 in conjunction with 42 U.S.C. § 9601 (20)(B), the real purpose and intent of Tariff 6607 becomes apparent. The Tariff is not designed primarily to deal with the improbable, indeed virtually impossible, scenario of a catastrophic release of a TIH material where the railroad faces "ruinous" liability without fault. Rather, Tariff 6607 is intended to deal with a more common situation where the railroad faces clean-up costs for the release of environmentally sensitive materials within its control and where, by statute, negligence need not, and most likely never will, be shown.

The obvious Congressional intent of CERCLA is to make the railroad common carrier responsible for clean-up costs because it has control over the hazardous substance

when released, and to limit the liability of the shipper to those situations where it can prevent the release by its actions. Tariff 6607 would reverse that Congressional determination and, by indemnity, force the shipper with no ability to prevent the release to bear the clean-up costs while absolving the railroad with the ability to prevent the release from any responsibility. The Board cannot and should not allow this reversal to occur.[2]

While making colorful arguments about TIH damages and enlisting academic experts to testify about the public benefits of avoiding their common carrier obligations with respect to TIH materials, the railroads in reality seek to reverse the Congressional intent by making shippers pay for releases of materials causing environmental damages under CERCLA.

By discussing the disingenuous behavior of the UP in this matter, the Interested Parties do not mean to suggest that some unspecified modification of the Tariff 6607 language limited to TIH indemnification would be lawful. To the contrary, as pointed out at length in Interested Parties' initial filing and in the filings of other parties as well, the railroads have a common carrier obligation to move TIH materials without imposing barriers to those movements by indemnification provisions or otherwise.[3]

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[2] The UP filing contains a detailed discussion of the terms of UP contracts, the precise terms of those contracts with respect to indemnification provisions, and UP's plans for the future of contract negotiations with other shippers. Since the Board has no jurisdiction over the terms of rail contracts and since the terms of contracts cannot possibly serve as a basis for a determination as to the lawfulness of tariff provisions, one is left to ponder the reason for these disclosures. Such disclosures clearly signal UP's confidential contract terms to other railroads and could be viewed as inviting them to join the UP in the contract terms disclosed herein, all of which is highly circumspect under the antitrust laws. Furthermore, if UP has been so successful in getting TIH shippers to agree to its indemnity in contracts, the Board should question why UP needs a declaratory order affirming the reasonableness of its tariff.

[3] Shipments under tariff are a central feature of the common carrier obligation, and transportation under tariff must be available without shippers' being subjected to unilaterally imposed conditions such as UP's indemnification provisions. UP's claim (at p. 4) that indemnification conditions similar to those at issue here have been incorporated into some TIH shipper contracts is unverifiable and irrelevant. UP admits that

II. THE RAILROAD COMMENTERS ATTEMPT TO BROADEN THIS PROCEEDING ON THREE LEVELS.

The railroad commenters seek to broaden this proceeding on three levels. First, they ask the Board to issue precisely the same type of abstract decision that the Board previously stated it would not do. Second, UP would apply its tariff to all liabilities, not just those arising from a TIH release. Third, UP would apply its tariff to more than just TIH materials. The Board should find all of these attempts to broaden the scope of this proceeding unreasonable.

A. The Railroad Commenters Ask The Board To Issue An Abstract Decision Beyond The Scope Of The UP Tariff.

When the Board initiated this proceeding, it did so for the purpose of removing uncertainty as to the reasonableness of specific indemnity language in UP's tariff. Dec. 12 Decision at 3. In Ex Parte No. 698, Establishment of the Toxic by Inhalation Hazard Common Carrier Transp. Advisory Comm., slip op at 4 n. 8 (served April 15, 2011), the Board denied the AAR's request for a broad policy statement approving liability-shifting arrangements as reasonable service terms for the transportation of TIH materials. Specifically, the Board declared that it would not issue such a policy statement in the abstract, but instead would resolve any disputes on a case-by-case basis. In its Petition for Declaratory Order, at 2, UP asked the Board to initiate this proceeding to resolve just such a dispute over the reasonableness of Items 50 and 60 in UP Tariff 6607. Based upon UP's representation, the Board concluded that this proceeding would not require the same type of abstract determination that the AAR had requested.

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shippers negotiating those contracts resisted inclusion of indemnification terms, and it would amount to speculation to attempt to guess whether inclusion of the indemnifications conditions was the result of unequal bargaining leverage or commercial considerations peculiar to particular shippers. Moreover, a Board decision finding the UP tariff indemnities to be reasonable effectively would that the UP tariff language becomes part of every TIH contract.

The railroad parties ask the Board to issue the very same type of abstract policy statement that the Board previously has stated it would not do. Except for UP, none of the railroad parties even discuss the specific indemnity language in the UP tariff. Indeed, some explicitly decline to take any position on UP's tariff.[4] The AAR unabashedly states that its comments are "directed at legal and policy issues pertaining to the scope of parties' obligation regarding TIH transport." AAR Comments at 3. While NS makes broad assertions that the UP tariff is reasonable, it does not address any specific language in the tariff. CP also discusses only broad policy issues.

In other words, the railroad parties attempt to convert this proceeding, which was initiated for the purpose of addressing the UP tariff, into a second bite at the apple to obtain a broad policy statement from the Board. The Board should reject the railroads' attempts to broaden the scope of this proceeding and should limit its decision to the specific UP tariff at issue. Of course, as emphasized below, the UP tariff itself is extremely broad. The fact that the comments of the other railroad parties go even farther is a strong indication that permitting any indemnification provision resembling that proposed by UP would open the floodgates for even more expansive and unjustified tariff provisions.

B. The UP Tariff Applies To More Than Just Liabilities Arising From The Release Of TIH Materials.

In their Opening Comments, at 5-7, the Interested Parties asserted that the UP tariff indemnity was unreasonably overbroad because it applied to all liabilities arising from the transportation of TIH materials, regardless whether there is a catastrophic

[4] BNSF Comments at 1 ("BNSF takes no position on the reasonableness of the specific provisions of the UP tariff items that are the subject of this proceeding."); AAR Comments at 3 ("The AAR takes no position and will not address...the specific terms of UP's or any other railroad's, tariff provisions for TIH transport.").

release of TIH materials, or even any release at all. UP confirms this fact when, at the top of page 6 in its Opening Comments, UP states: "The tariff makes the TIH shipper responsible for all liabilities arising out of the transportation [not release] of its TIH materials that are *not* caused, either in whole or in part, by UP." [underline added; italics in original] In other words, even ordinary liabilities that are no different from, or no greater than, liabilities posed by non-TIH commodities are shifted to the TIH shipper. This is true even when the TIH shipper had no role in causing an incident.

But, all the railroad parties in this proceeding attempt to justify liability shifting for TIH materials based upon the potentially ruinous liability of a catastrophic release.[5] Moreover, in its Petition to institute this proceeding, at 5, UP itself represented that its tariff indemnities are designed to address the "potentially staggering liabilities" of a TIH release. In its Opening Comments, UP submitted the Verified Statement of Diane Duren, UP's Vice President & General Manager-Chemicals, who frames her entire testimony with an introductory section titled "Railroads Bear Staggering Risks When They Transport TIH" that focuses exclusively upon the consequences of a catastrophic TIH release. UP Comments, Duren V.S. at 3-6. Although the UP tariff indemnities apply to far more than just a catastrophic TIH release, no railroad party has offered any justification for such a broad scope.

A simple example will illustrate the over-breadth of UP's tariff indemnities. A TIH material may be transported in a train that also contains hopper cars loaded with grain or plastics, which are not hazardous materials. If the private hopper car has a defective wheel that causes a derailment, the UP tariff would require the TIH shipper to

[5] AAR Comments at 7-10; BNSF Comments at 3; CP Comments at 3-4; NS Comments at 13-14.

indemnify UP against all of the damages arising from that derailment even though the TIH tank car did not cause the derailment and even if there was no release of the TIH material as a consequence of the derailment. In fact, UP might well argue that it could demand indemnification from the TIH shipper without first attempting to recover its damages from the hopper car owner. In this scenario, although the TIH material has nothing to do with the damages sustained, the TIH shipper remains liable simply because its TIH tank car happened to be on the same train as the hopper car that caused the incident.

The UP Comments, at 6-7, provide five examples of when the UP tariff would require indemnification. These examples do not all require any TIH release, some are simply inaccurate, some do not pose any greater liability risk to UP than non-TIH materials, and some would require the Board to inject itself into state tort law:

- *Texas Law.* This example predicated upon Texas law paints a highly improbable worst case scenario and does not require any TIH release at all. It assumes that the railroad/shipper liability ratio is 51/49% and that the plaintiff settles with the shipper for a minimal amount in favor of pursuing UP for the balance, in which case UP could be held liable for 100% of the damages less the shipper settlement. UP does not explain why a plaintiff would settle for a minimal amount with such a highly culpable shipper-defendant. Indeed, based upon railroad assertions in various STB competition hearings that chemical shippers have a much greater market capitalization than railroads, why would the plaintiff forego the deeper pockets of the shipper? Moreover, because a catastrophic TIH release is most likely the consequence of a high speed derailment caused by railroad negligence, the liability ratio is likely to be much more tilted toward the railroad. Furthermore, the result in this example is based upon the informed judgment of the Texas legislature, whereas the Board has no expertise or jurisdiction in tort law.

- *Illinois Law.* This scenario also is not predicated upon a catastrophic TIH release and it reflects the most extreme scenario under the Illinois statute.[6] Furthermore, the result in this example is based upon the informed judgment

[6] 735 ILCS 5/2-1117 imposes only several liability upon defendants who are less than 25% at fault.

of the Illinois legislature, whereas the Board has no expertise or jurisdiction in tort law.

- *Terrorist Attack.* UP erroneously claims that it could be held strictly liable under CERCLA for a TIH release caused by a terrorist attack. In fact, CERCLA provides a complete defense for third party acts. 42 U.S.C. §9607(b). Moreover, unlike other hazardous materials, TIH materials disperse into the atmosphere upon release, and thus are not likely to cause the ground contamination that would be subject to a CERCLA clean-up. UP's argument, therefore, is a red-herring.

- *No Party is Negligent.* UP claims that it could be held strictly liable under the Clean Water Act if a tornado causes a tank car with TIH materials to fall from a bridge and release its contents into a waterway. As with CERCLA, there is an Act of God defense. 33 U.S.C. § 1321(i). Moreover, UP's potential liability exposure for TIH materials in this scenario is not likely to be greater than for non-TIH materials.

- *Another Party's Negligence Cannot be Proven.* UP would invoke its indemnity if there was insufficient evidence to prove that either party was negligent. The example UP provides is a leaky valve that causes a discharge on UP property and the shipper denies responsibility. A leaky valve is a far cry from a catastrophic release. Moreover, UP's potential liability exposure is no greater, and perhaps less, than it would be for non-TIH materials.

In several of the foregoing scenarios, the UP indemnity tariff would apply regardless whether there is a catastrophic release of TIH materials, and in some scenarios, even if there is no release at all. Furthermore, the foregoing scenarios also could occur with non-TIH materials and, except for catastrophic releases, the non-TIH materials pose equal or greater liability risks than the TIH materials. Neither UP nor any other railroad party explains why TIH materials should be treated differently from other hazardous materials for these liabilities.

The expansive scope of UP's tariff indemnity indicates that this proceeding ultimately is about more than TIH materials. The railroad parties may perceive TIH materials as an easier mark, but have designs upon a much larger group of hazardous materials. If the Board finds that the exceptionally broad UP tariff is reasonable as to

TIH materials, it is not a great leap to apply the same logic to extend indemnification requirements to other hazardous materials.

C. The UP Tariff Applies To More Than Just TIH Materials.

It is not necessary to speculate as to railroad intentions to expand indemnification tariffs beyond TIH materials. UP Tariff 6607 already applies to several other categories of hazardous materials.

In both its Opening Comments and Petition, UP attached only excerpts from Tariff 6607 that contained general indemnification language in Items 50 and 60. However, UP omitted Item 2, which defines the applicability of the tariff, including Items 50 and 60. Item 2 states:

> The terms and conditions of this Tariff will apply to all shipments of PIH or TIH commodities that are listed in Attachment 1 or that are classified by the Department of transportation [sic] (DOT) as being within one or more of the categories described below, (Commodity)....
>
> - Materials poisonous by inhalation (PIH) as defined by DOT....49 CFR Section 171.8.
> - Materials listed as a hazardous substance in DOT HMR 49 CFR Section 173.31(f)(2) due to the environmentally sensitive nature of the Commodity.
> - Infectious substances subject to DOT HMR as a Division 6-2 material."

All of the justification for the UP tariff indemnity has been provided in the context of TIH materials. Indeed, no railroad party has mentioned any of these other commodities. To the extent that they would apply the same explanations, this Board should ask where this would stop. At what point do the railroads face liability risks that justify imposing indemnity requirements as a condition of common carrier service? What

has changed that renders such requirements necessary or reasonable today when railroads have transported such commodities for as long as 100 years without those requirements?

IV. THE RAILROAD ARGUMENTS ABOUT SAFETY INCENTIVES ARE ACADEMIC AND UNWORKABLE

In an effort to persuade the Board that their efforts to impose indemnification liability are not simply another effort to exert their monopoly power, the railroads and their academic experts argue that "sharing" liability with shippers will provide useful incentives in favor of safety. But under the mutual indemnification provisions that heretofore have been the industry standard, shippers already indemnify railroads against the consequences of all activities that are within shippers' control and which could have safety consequences – notably activities associated with loading, sealing and otherwise preparing tank cars for rail transportation. The railroads do not and cannot cite any other shipper actions that would reduce risks, other than declining to ship TIH products at all.

Indeed, the railroads make little secret of the fact that what they are really asking for, and what could indeed be a consequence of the indemnification course they are pursuing, is for shippers not to ship TIH products. More precisely, the UP's witness Dr. Shavells advocates tariff provisions that will "*promote socially desirable – and discourage socially excessive – levels of shipping activity.*" Shavells V.S. at 3 (emphasis in original).

Precisely what is "socially desirable" is open to substantial debate. Even the most cursory consideration of this question shows how utterly impractical it is. First of all, it is worth noting that this concept is essentially academic and is not generally applied in tort law. Pause for a moment to consider how it might play out if applied. Might an automobile driver be found strictly liable for the consequences of an automobile accident

that is not caused by his negligence if the driver was unable to prove that his trip to get a gallon of milk at the grocery store was not absolutely necessary? Would the driver need to prove that he could have walked or taken the bus instead? In the context of shipping TIH products, would each case depend upon balancing factors such as the improved safety of municipal water supplies as a result of using chorine versus transportation risks, or the widespread benefits of affordable food grown with TIH fertilizers versus the extremely small risk of an accidental release?

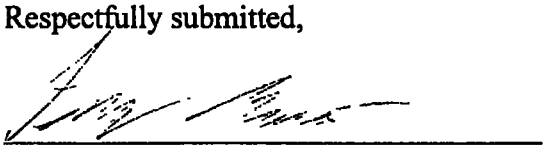
In any event, even if shippers "optimally sourced" their TIH products (NS comments at 24-25), under the UP's indemnification provision they would still be liable. In fact, as noted previously, they would be liable for any transportation-related exposure not directly tied to railroad negligence, even if that liability had nothing to do with the TIH product at all. In short, the UP's proposed indemnification tariff is not designed to apply carefully designed and nuanced incentives – it is a sledgehammer approach which seeks to reduce and eventually end all shipments of TIH.

The railroads argue that the main risk factors in shipping TIH products are the amount of product and the distance over which it travels. This claim is simply incorrect. The main risk factors in the releases of TIH products that have occurred during the past few decades have been operator fatigue and operator error. These are not within the control of the shipper. They are squarely within the control of the rail carriers, as are the range of other safety conditions not involving railroad negligence that could affect releases of products – such as conditions at grade crossings to guard against accidents caused by negligent drivers, fences and other security features to reduce the risk of vandalism or intentional attack, and robust rights of ways and structures to resist the

ravages of severe weather and flooding. In all of these cases, safety would not be enhanced by shifting risk away from rail carriers. Public safety would best be enhanced by giving the railroads all appropriate incentives to invest in the ways that will make their systems safest. Shifting liability to shippers, who are not in a position to make such investments or to enhance the safety of railroad operations and who already incur considerable expenses to safety transport TIH commodities, would only, on net, decrease incentives for safety.

Railroad transportation of TIH materials is very safe, and has steadily gotten safer over the years. Given modern tank car designs and appropriate care in operations, the public has little reason to fear the release of TIH products. The Interested Parties look forward to continuing their efforts with railroads to design and use safer tank cars and conduct product hand-offs that reduce safety and security risk to the lowest level attainable. What will not further safer transportation is the proposed shotgun indemnity provision proffered by the UP, which would greatly increase uncertainty and the potential for endless litigation and lead to ever increasing efforts by railroads to place restrictions on movements of TIH and other hazardous materials.

Respectfully submitted,



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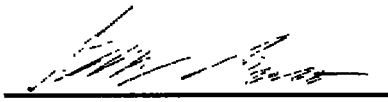
March 12, 2012

Certificate of Service

I hereby certify that on 12th day of March 2012, a copy of the foregoing Joint Reply Comments of the American Chemistry Council; The Chlorine Institute; The Fertilizer Institute; and The National Industrial Transportation League was served by electronic delivery on all parties of record in these proceedings.



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